APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A. AIDA KELSAW, Plaintiff-Appellant,	)	No. 81-3517
vs.	)	DC# 81-378
UNION PACIFIC RAILROAD COMPANY, a Utah corporation, Defendant-Appellant.	)	OPINION

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, District Judge, Presiding
Argued and Submitted August 3, 1982

Before: SNEED, and SKOPIL, Circuit Judges,
and STEPHENS*, District Judge

SNEED, Circuit Judge:

Appellant Kelsaw seeks to overturn the dismissal of her complaint by the district court. In dismissing the complaint the district court held that

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*Honorable Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1976), authorizes no cause of action by the spouse of a railroad employee for loss of consortium. We affirm.

I.

SUMMARY OF COMPLAINT

Plaintiff-Appellant alleged in her complaint that the defendant-appellee was a corporation that operated a railroad and was engaged in interstate commerce. It was also alleged that plaintiff-appellant's husband was an employee of the defendant-appellee and worked as a brakeman at the time when he was injured as a result of defendant-appellee's negligence. Because of the injury and the employer's negligence the complaint asserts that "the plaintiff has a loss of consortium claim for damages in the sum of $500,000 general damages." The prayer for relief seeks a judgment in that amount.

II.

ANALYSIS

Appellant admits that the dismissal was proper under existing law. We have held specifically that the spouse of an injured railroad employee may not sue for loss of consortium under the FELA. Jess v. Great Northern Railroad Co., 401 F.2d 535 (9th Cir. 1968). We relied on the Supreme Court's decision in New York Central & Hudson River Railroad v. Tonsellito, 244 U.S. 360 (1917), in which it was held that, although under common law a father could recover for the loss of services of a not fatally injured minor child, no such cause of action existed under FELA. The Court stated:

> "There [referring to earlier cases] we held the act 'is comprehensive and also exclusive' in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce.

> 'It establishes a rule or regulation which is intended to operate uniformly in all the states as respects interstate commerce, and in that field it is both paramount and exclusive.' Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state." 244 U.S. at 361-62.

The appellant seeks to avoid the controlling effect of Tonsellito and the earlier Michigan Central Railroad v. Vreeland, 227 U.S. 59 (1913), by arguing that it has been qualified to the extent that a common law cause of action on the part of the spouse of an employee for loss of consortium is permitted to exist. She cites American Export Lines v. Alvez, 446 U.S. 274 (1980), to support her contention. In Alvez, the Court, after recognizing that under Sea-Land Services, Inc. v. Gaudet,

414 U.S. 573 (1974), a surviving spouse could recover damages for the loss of her deceased longshoreman husband's society following his mortal injury while working aboard a vessel in state territorial waters, held that the wife of a harbor worker injured nonfatally aboard a vessel in similar waters also could recover under general maritime law for the loss of her husband's society. 414 U.S. at 275-76. Neither the Death on the High Seas Act, 46 U.S.C § 762 (1976), nor the Jones Act, 46 U.S.C. § 688 (1976), under which such recoveries are not permitted, were held to bar "recognition of a claim for loss of society by judicially crafted general maritime law." 446 U.S. at 281-82. See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); Ivy v. Security Barge Lines, 606 F.2d 524 (5th Cir. 1979) (en banc), cert. denied 446 U.S. 956 (1980). The Court refused to engraft on general

maritime law the exclusivity accorded FELA by Tonsellito and the earlier limitation of Michigan Central Railroad v. Vreeland, supra.

In no way, however, did the Court reject either the limits placed on recoveries under FELA by Vreeland or its exclusivity as recognized by Tonsellito. Under these circumstances we must adhere to both. While it is true that the Court in Alvez looked with favor upon permitting a recovery for a loss of consortium, we have no authority to attempt to anticipate that it will overrule Tonsellito and Vreeland. Nor does the court's decision in Higginbotham encourage us to do so. If and when the Supreme Court decides to overrule Tonsellito and Vreeland we will do our duty. Until then we must obey their teaching.

AFFIRMED.

F I L E D

Sep. 9, 1982

PHILLIP B. WINBERRY
Clerk US Court of Appeals

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AIDA KELSAW,	)	
	)	
Plaintiff,	)	Civil No. 81-378
	)	
v.	)	ORDER DENYING
	)	PLAINTIFF'S
UNION PACIFIC RAILROAD	)	MOTION FOR
COMPANY, a corporation,	)	RECONSIDERATION
	)	
Defendant.	)	

Plaintiff's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED the 7th day of August, 1981.

/s/ Owen M. Panner
Owen M. Panner
United States District Judge

U.S. DISTRICT COURT
DISTRICT OF OREGON
F I L E D
AUG 7, 1981

ROBERT M. CHRIST, CLERK
By _____ Deputy

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AIDA KELSAW, Plaintiff,	)	CIVIL 81-378
vs.	)	JUDGMENT
UNION PACIFIC RAILROAD COMPANY, a corporation, Defendant.	)	

Based on the record,

IT IS ORDERED that plaintiff shall take nothing and this action is dismissed.

DATED August 3, 1981.

/s/ Robert M. Christ
ROBERT M. CHRIST,
CLERK

U.S. DISTRICT COURT
DISTRICT OF OREGON

F I L E D

AUG 3, 1981

ROBERT M. CHRIST, CLERK
By_____ Deputy

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AIDA KELSAW,	)	
	)	
Plaintiff,	)	Civil No. 81-378
	)	
v.	)	ORDER
	)	
UNION PACIFIC RAILROAD COMPANY, a corporation,	)	
	)	
Defendant.	)	

IT IS ORDERED that defendant's motion to dismiss is granted.

Dated this 25 day of July, 1981.

/s/ Owen M. Panner
United States District Judge

U.S. DISTRICT COURT
DISTRICT OF OREGON

F I L E D

JUL 27, 1981

ROBERT M. CHRIST, CLERK
By _____ Deputy

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

AIDA KELSAW,	)	
	)	
Plaintiff,	)	Civil No. 81-378
	)	
v.	)	FINDINGS AND
	)	RECOMMENDATION
UNION PACIFIC RAILROAD COMPANY, a corporation,	)	
	)	
Defendant.	)	

This is an action brought by the wife of an injured employee of defendant for loss of consortium. Plaintiff bases her claim on the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. (FELA)

Defendant moves to dismiss the case because it contends that as a matter of law the spouse of an injured railroad employee does not have a claim under FELA for loss of consortium. Plaintiff agrees that the cases have held there is no claim for loss of consortium under FELA. However, plain-

tiff argues that the Supreme Court has impliedly repudiated that line of cases by recognizing the right of spouses of harborworkers under general maritime common law to sue for loss of consortium. Although plaintiff's argument is intriguing, it is not persuasive. I find that as a matter of law the spouse of an injured railroad employee may not sue for loss of consortium under FELA. Accordingly, defendant's motion to dismiss should be granted.

CASE LAW

The Ninth Circuit has specifically held that the spouse of an injured employee may not sue for loss of consortium under FELA. Jess v. Great Northern Railroad Company, 401 F.2d 535 (9th Cir. 1968). The Ninth Circuit relied on New York Central & Hudson River Railroad Company v. Tonsellito, 244 U.S. 360 (1917). In Tonsellito the Supreme Court ruled that the father of a

minor employee of a railroad was not entitled damages for loss of his son's services.

> The court of Errors and Appeals ruled, and it is now maintained, that the right of action asserted by the father existed at common law and was not taken away by the Federal Employers' Liability Act. But the contrary view, we think, is clearly settled by our recent opinions . . . . [T]he act "is comprehensive and, also, exclusive" in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce. "It establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce and in that field it is both paramount and exclusive." Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State.

Id. at 362-363 (citations omitted).

PLAINTIFF'S ARGUMENT

Plaintiff's argument is based on the holding in American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) in which

the Supreme Court recognized the right of the spouse of an injured harborworker to sue for loss of consortium under general maritime law. Plaintiff argues:

> Seaman . . . have the rights and remedies of railway employees. FELA. Since the Jones Act is the progeny of the Federal Employees [sic] Liability Act, and the Jones Act now allows for loss of consortium, this right or remedy . . . clearly should be part of the EELA.

Plaintiff is incorrect in stating that the Jones Act now allows for loss of consortium. In Alvez, the Supreme Court held that the Jones Act does not exclusively regulate longshoremen's remedies. Alvez, supra at 282-283. It then held that under general maritime common law there is a right to sue for loss of consortium

The Supreme Court did, however, criticize the Jones Act:

> The Jones Act itself was not the product of careful drafting or attentive legislative review. . .; assuming that the statute bars damages for loss of society, it does so solely by virtue of judicial interpretation of the Federal Employers' Liability Act . . . which was incorporated into the Jones Act . . . Thus a remedial omission in the Jones Act is not evidence of considered congressional policymaking that should command our adherence in analogous contexts.

Id. at 283-284 (citations omitted).

Plaintiff argues that the words "solely by virtue of judicial interpretation" encourage the conclusion that given the opportunity, the Supreme Court would recognize the right to sue for loss of consortium under FELA. I disagree.

CONCLUSION

FELA, unlike the Jones Act, is the exclusive remedy for injuries to employees who are protected by it. Tonsellito, supra at 363. The Supreme Court recognized

in Tonsellito that that exclusive remedy may not be extended by the common law. Id. The Jones Act, on the other hand, is not exclusive. Alvez, supra at 282-283. Consequently the Supreme Court in Alvez was able to look to the general maritime common law to find a right to sue for loss of consortium. It found that such a right exists at common law.

Since FELA is the exclusive remedy for injuries to railroad employees it is irrelevant in this case whether there is a common law right to sue for loss of consortium. FELA itself is the only possible source of a right to sue for loss of consortium. The Ninth Circuit has already held that FELA does not provide for such a right. Jess v. Great Northern Railroad Company, supra. I am bound by that holding to find that there is no

right under FELA for plaintiff in this action to sue for loss of consortium. Accordingly, defendant's motion to dismiss should be granted.

Dated this day of , 1981.

/s/ George E. Juba
United States Magistrate

Endorsed:
Filed 6/30/81
ROBERT M. CHRIST, CLERK

By _____
Deputy